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7

8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
10

11 LYCURGAN, INC. d/b/a ARES  
12 ARMOR,

Plaintiff,

13 v.

14 B. TODD JONES, in his official  
capacity as Head of the San  
15 Diego Bureau of Alcohol,  
Tobacco, Firearms and  
16 Explosives; and DOES 1-10,  
Defendants.  
17

CASE NO. 14-CV-1679 JLS (BGS)

**PLAINTIFF'S OBJECTION TO  
DECLARATION OF ARMANDO  
HERNANDEZ**

Judge: Hon. Janis L. Sammartino  
Dept.: 4A  
Date: March 6, 2015  
Time: 1:30 P.M.

18 **OBJECTIONS TO DECLARATION OF RESIDENT AGENT IN CHARGE**  
19 **ARMANDO HERNANDEZ IN OPPOSITION OF MOTION FOR NEW**  
20 **TRIAL**

**Objection No. 1**

21 "1. I am the Resident Agent in Charge (RAC) of San Diego Group IV for  
22 the Los Angeles Field Division, Bureau of Alcohol, Tobacco, Firearms and  
Explosives (ATF). In my capacity as the RAC, I am aware of the facts  
23 surrounding the seizure of EP80 firearms from Ares Armor and the  
subsequent return of those firearms."  
24

**Basis for Objection**

25 With the foregoing language, Declarant Hernandez invalidates his  
26 declaration at the outset. "A witness may not testify to a matter unless evidence is  
27 introduced sufficient to support a finding that the witness has personal knowledge  
28 of the matter." (Fed. R. Evid. 602.) The Declarant does not claim to have personal

1 knowledge of the matter, but rather admits that he merely is “aware of the facts  
2 surrounding” the matter.

3 The personal knowledge requirement reflects the common law’s judicious  
4 demand for the most reliable sources of information. (See FRE 602, Adv. Comm.  
5 Notes (1972); *United States v. Lemire* (DC Cir. 1983) 720 F.2d 1327, 1347;  
6 *Carmen v. San Francisco Unified School Dist.* (9th Cir. 2001) 237 F.3d 1026,  
7 1028.) The testimony must be based upon what he or she actually observed or  
8 perceived through his or her own senses—i.e. the witness must have first-hand  
9 knowledge acquired by directly perceiving the event that is the subject of his or  
10 her testimony. (See FRE 602, Adv. Comm. Notes (1972); *SEC v. Singer* (SD NY  
11 1992) 786 F.Supp. 1158, 1167.) In sum, the personal knowledge requirement  
12 requires (1) an opportunity to observe an event and (2) actual observation of the  
13 event—mere presence at the event or occurrence is not enough. (See *McCrary-El*  
14 *v. Shaw* (8th Cir. 1993) 992 F.2d 809, 810-11.)

15 Here, because the declarant merely claims to be aware of facts surrounding  
16 the matter, but does not claim to have personal knowledge of those facts, the  
17 declaration is improperly advanced for lack of personal knowledge under Fed. R.  
18 Evid. 602.

19 **Objection No. 2**

20 “2. On March 15, 2014, ATF executed Federal Search Warrants at four Ares  
21 Armor locations searching for evidence of illegally manufactured and  
22 distributed firearms. Under the authority of those search warrants, ATF seized  
23 all EP80 model firearms on the premises. Prior to departing the locations,  
ATF provided a receipt for the property identifying 5804 firearms were seized  
by ATF.”

24 **Basis for Objection**

25 Lack of personal knowledge. (FRE 602.) Hearsay (FRE 802.) “A witness may not  
26 testify to a matter unless evidence is introduced sufficient to support a finding that the  
27 witness has personal knowledge of the matter.” (Fed. R. Evid. 602.) The personal  
28 knowledge requirement reflects the common law’s judicious demand for the most reliable

sources of information. (See FRE 602, Adv. Comm. Notes (1972); *United States v. Lemire* (DC Cir. 1983) 720 F.2d 1327, 1347; *Carmen v. San Francisco Unified School Dist.* (9th Cir. 2001) 237 F.3d 1026, 1028.) The testimony must be based upon what he or she actually observed or perceived through his or her own senses—i.e. the witness must have first-hand knowledge acquired by directly perceiving the event that is the subject of his or her testimony. (See FRE 602, Adv. Comm. Notes (1972); *SEC v. Singer* (SD NY 1992) 786 F.Supp. 1158, 1167.) In sum, the personal knowledge requirement requires (1) an opportunity to observe an event and (2) actual observation of the event—mere presence at the event or occurrence is not enough. (See *McCrary-El v. Shaw* (8th Cir. 1993) 992 F.2d 809, 810-11.)

Here, Plaintiff objects to declaration of Armando Hernandez and the testimony contained therein because Mr. Hernandez lacks any personal knowledge of the events contemplated by his declaration. Mr. Hernandez was only present at the Oceanside location. [Karras Decl. ¶ 5-6.] Thus, he was not present or capable of perceiving any of the events at the other locations. Moreover, because he did not participate in the count of the seized items or issuance of the reception, he cannot speak to those events. [Id.] Because he was not present at the specific locations of the events declared, he was incapable of observing the events and perceiving with them with his own senses. As such, the declaration is void for want of personal knowledge. For the same reasons, his statements merely constitute hearsay and are therefore inadmissible under Fed. R. Evid. 802.

### **Objection No. 3**

“3. The firearms were sealed inside large boxes and loaded directly into a transport van for transport to an ATF storage facility. ATF personnel retained custody and control of the seized firearms through transit and ensured all firearms were locked up inside the storage facility.”

### **Basis for Objection**

Lack of personal knowledge. (FRE 602.) Hearsay (FRE 802.) “A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” (Fed. R. Evid. 602.) The personal

1 knowledge requirement reflects the common law's judicious demand for the most reliable  
 2 sources of information. (See FRE 602, Adv. Comm. Notes (1972); *United States v. Lemire*  
 3 (DC Cir. 1983) 720 F.2d 1327, 1347; *Carmen v. San Francisco Unified School Dist.* (9th  
 4 Cir. 2001) 237 F.3d 1026, 1028.) The testimony must be based upon what he or she actually  
 5 observed or perceived through his or her own senses—i.e. the witness must have first-hand  
 6 knowledge acquired by directly perceiving the event that is the subject of his or her  
 7 testimony. (See FRE 602, Adv. Comm. Notes (1972); *SEC v. Singer* (SD NY 1992) 786  
 8 F.Supp. 1158, 1167.) In sum, the personal knowledge requirement requires (1) an  
 9 opportunity to observe an event and (2) actual observation of the event—mere presence at  
 10 the event or occurrence is not enough. (See *McCrary-El v. Shaw* (8th Cir. 1993) 992 F.2d  
 11 809, 810-11.)

12 Here, Plaintiff objects to declaration of Armando Hernandez and the testimony  
 13 contained therein because Mr. Hernandez lacks any personal knowledge of the events  
 14 contemplated by his declaration. He was not present perceive each of the events to which  
 15 he declares. [See Karras Decl.] Because he was not present at the location of the events  
 16 declared, he was incapable of observing the events and perceiving with them with his own  
 17 senses. As such, the declaration is void for want of personal knowledge. For the same  
 18 reasons, his statements merely constitute hearsay and are therefore inadmissible under Fed.  
 19 R. Evid. 802.

#### 20 **Objection No. 4**

21 "4. On December 22, 2014, ATF retrieved all the EP80 firearms boxes from  
 22 storage for transport to the ATF Carlsbad field office to facilitate the return  
 23 of the seized property to Ares Armor. There was no indication that the storage  
 24 facility had been breached or that any of the original boxes containing the  
 seized firearms had been opened."

#### 25 **Basis for Objection**

26 Lack of personal knowledge. (FRE 602.) Hearsay (FRE 802.) "A witness may not  
 27 testify to a matter unless evidence is introduced sufficient to support a finding that the  
 28 witness has personal knowledge of the matter." (Fed. R. Evid. 602.) The personal

1 knowledge requirement reflects the common law’s judicious demand for the most reliable  
 2 sources of information. (See FRE 602, Adv. Comm. Notes (1972); *United States v. Lemire*  
 3 (DC Cir. 1983) 720 F.2d 1327, 1347; *Carmen v. San Francisco Unified School Dist.* (9th  
 4 Cir. 2001) 237 F.3d 1026, 1028.) The testimony must be based upon what he or she actually  
 5 observed or perceived through his or her own senses—i.e. the witness must have first-hand  
 6 knowledge acquired by directly perceiving the event that is the subject of his or her  
 7 testimony. (See FRE 602, Adv. Comm. Notes (1972); *SEC v. Singer* (SD NY 1992) 786  
 8 F.Supp. 1158, 1167.) In sum, the personal knowledge requirement requires (1) an  
 9 opportunity to observe an event and (2) actual observation of the event—mere presence at  
 10 the event or occurrence is not enough. (See *McCrary-El v. Shaw* (8th Cir. 1993) 992 F.2d  
 11 809, 810-11.)

12 Here, Plaintiff objects to declaration of Armando Hernandez and the testimony  
 13 contained therein because Mr. Hernandez lacks any personal knowledge of the events  
 14 contemplated by his declaration. He was not there. Because he was not present at the  
 15 location of the events declared, he was incapable of observing the events and perceiving  
 16 with them with his own senses. Moreover, the Declaration of Plaintiff Karras— an  
 17 individual with personal knowledge — clearly indicate that a third box was tampered with  
 18 and unsealed, contrary to the unsupported assertions of the declarant. [Karras Decl. ¶ 8;  
 19 McMillan Decl. ¶ As such, the declaration is void for want of personal knowledge. For the  
 20 same reasons, his statements merely constitute hearsay and are therefore inadmissible under  
 21 Fed. R. Evid. 802.

## 22 **Objection No. 5**

23 “5. On December 23, 2014, ATF returned the seized EP80 firearms to Ares  
 24 Armor. As part of the orderly return, ATF and personnel from Ares Armor  
 25 counted each firearm. On some instances, the count indicated on the outside  
 26 of the sealed box did not match the count when opened and individually  
 counted. The final count of EP80 firearms returned to Ares Armor was  
 5,786.”

## 27 **Basis for Objection**

28 Lack of personal knowledge. (FRE 602.) Hearsay (FRE 802. “A witness may not

1 testify to a matter unless evidence is introduced sufficient to support a finding that the  
 2 witness has personal knowledge of the matter.” (Fed. R. Evid. 602.) The personal  
 3 knowledge requirement reflects the common law’s judicious demand for the most reliable  
 4 sources of information. (See FRE 602, Adv. Comm. Notes (1972); *United States v. Lemire*  
 5 (DC Cir. 1983) 720 F.2d 1327, 1347; *Carmen v. San Francisco Unified School Dist.* (9th  
 6 Cir. 2001) 237 F.3d 1026, 1028.) The testimony must be based upon what he or she actually  
 7 observed or perceived through his or her own senses—i.e. the witness must have first-hand  
 8 knowledge acquired by directly perceiving the event that is the subject of his or her  
 9 testimony. (See FRE 602, Adv. Comm. Notes (1972); *SEC v. Singer* (SD NY 1992) 786  
 10 F.Supp. 1158, 1167.) In sum, the personal knowledge requirement requires (1) an  
 11 opportunity to observe an event and (2) actual observation of the event—mere presence at  
 12 the event or occurrence is not enough. (See *McCrary-El v. Shaw* (8th Cir. 1993) 992 F.2d  
 13 809, 810-11.)

14 Here, Plaintiff objects to declaration of Armando Hernandez and the testimony  
 15 contained therein because Mr. Hernandez lacks any personal knowledge of the events  
 16 contemplated by his declaration. Mr. Hernandez was present at the location but he did not  
 17 participate in the count or perceive any of the events to which he declares. [Karras Decl. ¶  
 18 7.] As such, the declaration is void for want of personal knowledge. For the same reasons,  
 19 his statements merely constitute hearsay and are therefore inadmissible under Fed. R. Evid.  
 20 802.

#### 21 **Objection No. 6**

22 “6. ATF does not have any EP80s firearms seized from Ares Armor in its  
 23 possession nor did ATF remove any EP80 firearms from storage for further  
 24 evidentiary testing.”

#### 25 **Basis for Objection**

26 Lack of personal knowledge. (FRE 602.) Hearsay (FRE 802.) “A witness may not  
 27 testify to a matter unless evidence is introduced sufficient to support a finding that the  
 28 witness has personal knowledge of the matter.” (Fed. R. Evid. 602.) The personal

knowledge requirement reflects the common law's judicious demand for the most reliable sources of information. (See FRE 602, Adv. Comm. Notes (1972); *United States v. Lemire* (DC Cir. 1983) 720 F.2d 1327, 1347; *Carmen v. San Francisco Unified School Dist.* (9th Cir. 2001) 237 F.3d 1026, 1028.) The testimony must be based upon what he or she actually observed or perceived through his or her own senses—i.e. the witness must have first-hand knowledge acquired by directly perceiving the event that is the subject of his or her testimony. (See FRE 602, Adv. Comm. Notes (1972); *SEC v. Singer* (SD NY 1992) 786 F.Supp. 1158, 1167.) In sum, the personal knowledge requirement requires (1) an opportunity to observe an event and (2) actual observation of the event—mere presence at the event or occurrence is not enough. (See *McCrary-El v. Shaw* (8th Cir. 1993) 992 F.2d 809, 810-11.)

Here, Plaintiff objects to declaration of Armando Hernandez and the testimony contained therein because Mr. Hernandez lacks any personal knowledge of the events contemplated by his declaration. There are insufficient facts explaining Mr. Hernandez's knowledge or perception of the facts declared. As such, the declaration is void for want of personal knowledge. For the same reasons, his statements merely constitute hearsay and are therefore inadmissible under Fed. R. Evid. 802.

### Conclusion

In sum, and for the foregoing reasons, Plaintiff objects to the declaration of Armando Hernandez in opposition to Plaintiff's motion for new trial.

DATED: February 19, 2015

Respectfully submitted:  
THE MCMILLAN LAW FIRM, APC  
/s/ Scott A. McMillan

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Scott A. McMillan  
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Lycurgan, Inc.